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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1013

MELVIN DANIEL HANNERS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Melvin Daniel Hanners, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 12, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, pp. 2a-30a, *infra*) is reported at 485 F.2d 1333. No opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 12, 1973. A timely petition for rehearing, and suggestion for rehearing *en banc,* was denied on November 7, 1973 (See App. A, p. 1a, *infra*). On timely application, Mr. Justice White extended the time for filing this petition for a writ of certiorari to and including January 7, 1973. The petition was filed by that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment is violated by successive prosecutions for the same conduct under (1) a State gambling statute and (2) 18 U.S.C. § 1955, a Federal assimilative statute which incorporates the very same State gambling statute by reference.

2. Whether the Tenth Circuit improperly refused to consider whether the State statute made applicable by Federal law was unconstitutionally vague and excessively broad.

3. Whether the continued use by the lower courts of an instruction on reasonable doubt disapproved by this Court twenty years ago can be repeatedly excused as "harmless error."

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that:

> "No person . . . [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The relevant portions of 18 U.S.C. § 1955 and of the Colorado gambling statutes appear in Appendix D to this Petition, at pp. 33a-36a.

STATEMENT

On December 10, 1970, Petitioner Melvin Daniel Hanners was charged in a Criminal Complaint in the County Court in and for the City and County of Denver, Colorado, with six specific violations of the Colorado gambling statute.[1] On October 26, 1971, he entered a plea of guilty to the fifth count which charged him with engaging in gambling for a livelihood. The other five counts were dismissed with prejudice, and Mr. Hanners was sentenced to one year in jail and a $500 fine. Eleven months and twenty days of the jail sentence were suspended on the condition that no similar violation occur for a period of one year and that the defendant pay costs.

Subsequently, on July 14, 1972, Petitioner, along with nine other individuals, was indicted in the United States District Court for the District of Colorado for violation of 18 U.S.C. § 1955. The gravamen of Count I, the only count of the indictment which was directed to Petitioner, was the charge that he had conducted an illegal gambling business in violation of the same Colorado gambling statutes under which he had been convicted in the State Courts. The indictment specifically charged that Hanners' activities were "in violation of

[1] 1. Keeping a gambling room, Colo. Rev. Stat. Ann. § 40-10-7; Conspiracy to keep a gambling room, Colo. Rev. Stat. Ann. § 40-7-35; Keeping a gambling table, Colo. Rev. Stat. Ann. § 40-10-8; Conspiracy to keep a gambling table, Colo. Rev. Stat. Ann. § 40-7-35; Gambling for a livelihood, Colo. Rev. Stat. Ann. § 40-10-8; and Conspiracy to gamble for a livelihood, Colo. Rev. Stat. Ann. § 40-7-35.

Chapter 40, Article 10, Sections 7, 8 and 9, Colorado Revised Statutes 1963, as amended." Over his objections, *inter alia*, that he was being subjected to double jeopardy, Petitioner was tried, convicted, and sentenced to two and one-half years' imprisonment and a $1,000 fine.

The jury was charged that (Tr. 1314) under the laws of Colorado—

> "It was unlawful for any person: (1) to keep any room or building to be used or occupied for gambling, or to knowingly permit the same to be used or occupied for gambling; or (2) to engage in gambling for a livelihood; or (3) to play at any game whatsoever for any sum of money or other property of value or to make any bet or wager for any sum of money or other property of value upon the result of such game;
>
> "and I further instruct you that each of these three was a separate offense under the Colorado State law, and a violation of any one of them is sufficient within the meaning of the federal statute which I have previously described to you."

The jury also was charged (Tr. 1319) that the Act covers "all those who participate in the operation of a gambling business, regardless of how minor their roles and whether or not they be labeled agents, runners, or independent contractors."

Finally, the jury was charged as follows with respect to reasonable doubt (Tr. 1316):

> "Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon in the more important of your personal affairs."

As stated, Petitioner was found guilty as charged in the indictment. The Tenth Circuit, in a 39-page opin-

ion rendered on October 12, 1973, affirmed the convictions of Petitioner and his co-defendants. It ruled that Petitioner was not subjected to double jeopardy because successive State and Federal prosecutions arising out of the same conduct are permissible under this Court's decisions in *Abbate* v. *United States*, 359 U.S. 187 (1959) and *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). (App. 14a). The Tenth Circuit refused to pass upon an attack upon the assimilated Colorado statute as being unconstitutionally vague, on the theory that the conviction "rested upon all three statutes" (App. 17a), *viz.*, three sections of the Colorado Code, but only one of those sections had been attacked on grounds of vagueness. Finally, the Tenth Circuit, while acknowledging (App. 22a-23a) that the reasonable doubt instruction given here had been disapproved in 1954 by this Court in *Holland* v. *United States*, 348 U.S. 121, 140 (1954), ruled that the error was not "reversible."

REASONS FOR GRANTING THE WRIT

1. This case raises an important and novel issue under the double jeopardy clause of the Fifth Amendment. In *Abbate* v. *United States*, 359 U.S. 187 (1959), and *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), this Court ruled that because the Federal Government and the States are different sovereignties, the double jeopardy clause did not bar successive Federal and State prosecutions arising out of the same acts. This Court has not had occasion to determine whether the "dual sovereignty" rationale of *Abbate* and *Bartkus*,[2] can be

[2] The vitality of the "dual sovereignty" concept expressed in *Abbate* and *Bartkus* is questionable, for it stems from a time prior to this Court's decison in *Benton* v. *Maryland*, 395 U.S. 784 (1969), when it was not considered that the double jeopardy

stretched to allow successive prosecutions under State law and a Federal assimilative statute incorporating the same State law. That is the question presented by the decision below and this petition.

The technique of adopting State criminal statutes as the substance of Federal criminal statutes has been employed with increasing frequency, and today there are numerous Federal statutes which rely upon State law.[3] Thus, the issue here is an extremely important one in the administration of criminal justice, and in the relationship of Federal and State systems. As the present case shows, this practice of utilizing State

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clause of the Fifth Amendment was binding upon the States. The continuing vitality of the rule, and particularly its wisdom, have been challenged. See *State* v. *Fletcher*, 22 Ohio App. 83, 259 N.E. 2d 146 (1970), and authorities there cited.

[3] *E.g.*, 18 U.S.C. § 13 (General assimilative crimes statute);
18 U.S.C. § 842 (Distribution of explosives to State in violation of State laws);
18 U.S.C. § 922(b)(2) (Sale of firearms);
18 U.S.C. § 1153 (Offenses within Indian country);
18 U.S.C. § 1262 (Transportation of liquor);
18 U.S.C. § 1511 (Obstruction of State or local law enforcement to facilitate "illegal gambling business");
18 U.S.C. § 1821 (Transportation of dentures to persons unauthorized under State law);
18 U.S.C. § 1911 (Receiver mismanaging property);
18 U.S.C. § 1952 ("Racketeering");
18 U.S.C. § 1953 (Interstate transportation of wagering paraphernalia);
18 U.S.C. § 1955 ("Illegal gambling business" in violation of State law);
16 U.S.C. § 705 (Shipping birds killed or captured in violation of State laws);
16 U.S.C. § 852 (Transportation of black bass or other fish caught in violation of State laws); and
27 U.S.C. § 122 (Shipment of liquor to place where use unlawful).

statutes as the basis of Federal law compounds the possibilities of double prosecutions for the same offense. The increasing seriousness of the problem of overlapping State and Federal prosecutions arising from the same conduct has been recognized in the Final Report of the National Commission on Reform of Federal Criminal Laws, reprinted in Hearings on Reform of the Federal Criminal Laws, Subcomm. on Crim. Laws and Procedure, of Sen. Judiciary Comm. 92d Cong. 1st Sess., pt. 1 (1971).[4] This Court also recently pointed out that:

> "As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced. Comment, Twice in Jeopardy, 75 Yale L.J. 262, 279-280; Note, Double Jeopardy and the Concept of Identity of Offenses, 7 Brooklyn L.Rev. 79, 82." *Ashe* v. *Swenson*, 397 U.S. 436, 445 n. 10 (1970).

In the past, the Department of Justice had a policy of declining to bring a second prosecution arising out of the same conduct, even where allowed by *Abbate*, except in rare cases and upon the approval of high-ranking officers.[5] The present prosecution of Petitioner

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[4] The Federal Criminal Code proposed by the Commission would bar State prosecutions where a prior Federal prosecution was "based on the same conduct or arose from the same criminal episode" unless the Federal statute was "intended to prevent a substantially different harm or evil," than the State law. Proposed Code § 708. See Note, Piggyback Jurisdiction in the Proposed Federal Criminal Code, 81 Yale L.J. 1209, 1235-37 (1972). See also John L. McClellan, The Challenge of a Modern Federal Criminal Code, 57 A.B.A. B.J. 585, 588-89 (1971).

[5] See Department of Justice Press Release of April 6, 1959; *Petite* v. *United States*, 361 U.S. 529 (1960); cf. *Marakar* v. *United States*, 370 U.S. 723 (1962).

Hanners represents an aggressive departure from that policy, at the very time when the dangers of overreaching second prosecutions are increasing due to the proliferation of statutes, other policies of the Federal prosecutorial officials, and the greater intrusion of the Federal Government into matters which formerly were viewed as ones for local authorities. In general, the Federal Government has of late stressed cooperative efforts with State law enforcement agencies in combating crime.[6] While such joint efforts between Federal and State officials may well be for the public good, they bring new possibilities of oppressive prosecutions which subvert the purposes of the double jeopardy clause to prevent "repeated attempts to convict" or penalize,[7] and which leave the subject "in a continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. 184 (1955).

The double jeopardy problem presented by this prosecution of Mr. Hanners is yet further compounded by the fact that it is brought under a Federal statute—again one of an increasing number—which invokes the commerce clause to intrude deeply into areas that traditionally have been regarded as in the State and local domain, and which reaches relatively minor and intra-

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[6] E.g., Department of Justice Press Release of September 24, 1971 (Article of Deputy Attorney General Richard G. Kleindienst in *The Police Chief*, Sept. 1971, pp. 12-15).

[7] It is beyond cavil that the double jeopardy clause reaches repeated efforts to punish, or efforts to increase punishment already assessed, as well as ones to convict for the same offense. E.g., *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *United States* v. *Ball*, 163 U.S. 662, 669 (1896); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874).

state conduct.[8] See *Perez* v. *United States*, 402 U.S. 146 (1971); cf. *United States* v. *Bass*, 404 U.S. 336, 349-350 (1971); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). Such Federal statutes, which often carry heavier penalties than the underlying State statute, may be used by the Federal Government as "an elephant gun to shoot a mouse." See *United States* v. *Stagman*, 446 F.2d 489, 498 (6th Cir. 1971) (dissenting opinion).

In sum, this case and the decision below constitute an extension of the dual sovereignty rationale of *Abbate* and *Bartkus* into a domain and in a context which greatly expands the possibilities of unfair double prosecutions. Moreover, it is an example of the injustice which can arise from this expansion of *Abbate* and *Bartkus*. Petitioner Hanners, whom the Tenth Circuit recognized to be a "lesser" figure in the alleged gambling activities which are the subject of the instant indictment, was given a relatively light sentence by the Colorado Court, doubtless because he had ceased any gambling activities well before the State Court judgment (and even longer before the Federal indict-

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[8] As the Tenth Circuit pointed out (App. 29a-30a), 18 U.S.C. § 1955 was designed to reach "both to high level bosses and street level employees." H.R. Rep. 91-1549, 91st Cong., 2d Sess. (1970), p. 53; 2 U.S. Code Cong. & Admin. News 1970, p. 4029; accord, *United States* v. *Hunter*, 478 F. 2d 1019 (7th Cir. 1973). The jury was so charged here (Tr. 1319, quoted above, at p. 4).

It has similarly been held that the Government need not prove any specific relationship of the defendant's activities to interstate commerce; this requisite of Federal jurisdiction has been held satisfied by the Congressional declaration that in general, illegal gambling activities burden commerce. *United States* v. *Hunter*, *supra*; *United States* v. *Becker*, 461 F. 2d 230, 233-4 (2d Cir. 1972). No such specific proof was presented in this case.

ment [9]), and was constructively and gainfully employed. Nonetheless, the Federal Government proceeded to invoke the same violations of Colorado laws arising from the same participation in a gambling business to exact a heavier penalty. As the Tenth Circuit pointed out (App. 24a), "[t]he gambling activities for which appellants were convicted find their origin in Colorado laws." The "double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," *Benton* v. *Maryland*, 395 U.S. 784, at 794 (1969), which should not be watered down by the employment of fictions which deem the same violation of the same Colorado law to be separate offenses.[10]

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[9] This is attested to by the fact that Hanners, unlike the other defendants, was not charged in Count II of the Federal indictment, which relates to activities occurring later than those in Count I.

[10] The Government contended below that a second prosecution was permissible because 18 U.S.C. § 1955 requires for conviction the presence of certain elements in addition to those contained in the Colorado statute, *i.e.*, that five or more people be involved in the gambling business; and that it be in substantially continuous operation for more than thirty days, and have a gross revenue of $2,000 in a single day. Not only are these "requirements" entirely secondary to the violation of the State statute which is at the heart of any prosecution under 18 U.S.C. § 1955, but the Tenth Circuit held (affirming the District Court's instructions (Tr. 1320-21) to this effect) that there need be no specific proof of an individual's intent to involve himself with four or more others in a gambling business, or the volume of *his* revenues, or the continuous character of *his* involvement; or indeed that he knew about these aspects of the gambling business at all (App. 23a-25a, 29a). Under this ruling an individual defendant therefore, without additional conduct, intention, or knowledge, may be subjected to a second prosecution for violating the State law. Surely these "additional requirements" do not detract from Petitioner's plea of double jeopardy.

This Court has steadfastly rejected other attempts to rely on expansive concepts of "dual sovereignty" to skirt the double jeopardy clause. See *Grafton* v. *United States*, 206 U.S. 333 (1907) (soldier acquitted by general court-martial cannot be tried in territorial court for violation of "local" law); *Waller* v. *Florida*, 397 U.S. 387 (1970) (dual prosecution by a State and its municipalities impermissible); see also *United States* v. *Canty*, 469 F.2d 114, at 128-129, n. 20 (D.C. Cir. 1972) ("the double jeopardy clause clearly bars overlapping prosecutions under District of Columbia law and nationally-applicable federal laws.") Second prosecutions similarly should not be allowed under Federal statutes which themselves blur strict notions of "sovereignty" by incorporating State law and reaching to primarily local concerns.

In sum, this case squarely presents a constitutional issue of considerable significance. Permitting two successive prosecutions grounded on the very same State law raises a substantial and heretofore undecided issue under the double jeopardy clause, relates to a myriad of relatively recently enacted assimilative statutes and has a direct effect upon delicate Federal-State relationships in the field of criminal justice. The ruling below, allowing such prosecutions, should be reviewed by this Court.

2. The Tenth Circuit refused (App. 17a) to pass on the contention of appellants below that the underlying Colorado statute was unconstitutionally vague, reasoning that only one of the three sections of the Colorado statute was attacked, but the "conviction rested upon all three statutes." This ground of decision is unsound. In the present case, the jury was

charged that "a violation of any one" of the three sections of the Colorado statute would suffice to satisfy 18 U.S.C. § 1955. Thus, Petitioner not only may have been convicted for a violation of the section of the Colorado statute (Colo. Rev. Stat. Ann. § 40-10-8) which was attacked for vagueness, but his conviction may have rested entirely upon that violation. The Tenth Circuit was not accurate in stating that "conviction rested upon all three statutes"; more precisely it rested upon "*any* of three" provisions, one of which was challenged as unconstitutional. The Tenth Circuit plainly was obliged to consider that challenge, which was made to a statute the Colorado legislature itself found necessary to repeal and narrow considerably even before the Federal indictment was handed down here.[11]

Although this Court has recognized various doctrines of abstention designed to avoid unnecessary decisions upon Constitutional issues, it has made clear that those doctrines do not give the lower courts *carte blanche* authority to escape their duty to decide genuine constitutional issues within their jurisdiction. *E.g., Zwickler* v. *Koota,* 389 U.S. 241, 246-50 (1967); *Garvin* v. *Rosenau,* 455 F.2d 233 (6th Cir. 1972). But

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[11] Colo. Rev. Stat. §§ 40-10-7, 8 and 9 were repealed on June 30, 1972 and replaced by Colo. Rev. Stat. § 40-1-103. (App. 35a-36a).

The challenged section of the Colorado Code § 40-10-8, like vagrancy statutes which this Court recently has held invalid, see *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972), provides for the convictions of "gamblers" on the basis of their low reputation rather than any clearly definable conduct. Thus, it provides that "if any person shall engage in gambling for a livelihood, or shall be without any fixed residence, and in the habit and practice of gambling, he shall be deemed and taken to be a common gambler," and subject to a jail sentence of three months to one year and a fine of $200 to $500.

here the Tenth Circuit went far beyond an "abstention" from deciding the constitutionality of the Colorado Statute while a definitive State ruling was made; it improperly sustained the Federal conviction and judgment of imprisonment of the defendants without considering whether they were tried under an unconstitutional measure.[12]

The settled doctrine that the Courts do not adjudicate merely hypothetical constitutional issues or ones of questionable immediacy to the parties (*e.g., Laird* v. *Tatum*, 408 U.S. 1 (1972) similarly has no proper application here. Unlike the situation in *Laird,* there is nothing hypothetical about being subjected to an indictment and actual criminal prosecution under a statute claimed to be unconstitutional. That circumstance has always been deemed sufficient to authorize and require adjudication of the constitutional issue. *E.g., Griswold* v. *State of Connecticut,* 381 U.S. 479 (1965); *United Public Workers* v. *Mitchell,* 330 U.S. 79, 92-93 (1947). The Tenth Circuit's refusal to pass upon the validity of the Colorado Statute is a serious misapplication of the doctrines by which this Court has avoided *unnecessary* constitutional rulings, and is plainly inconsistent with the decisions of this Court cited above. This holding, too, warrants further review.

3. The District Court employed a reasonable doubt instruction containing language which, as the Tenth Circuit recognized, was disapproved by this Court in

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[12] Where the Federal Government is prosecuting a defendant under an assimilative statute, and thus itself employing state legislation, it hardly can ask the defendant to apply to the State Courts for a ruling on the constitutionality of the Statute. The abstention doctrine therefore has no proper application in this situation.

Holland v. *United States*, 348 U.S. 121, 140 (1954). Specifically, the District Court charged the jury that (Tr. 1316) "Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon in the more important of your own personal affairs." The United States Attorney defended the reasonable doubt instruction below as a "standard" one; and the Tenth Circuit held that the error was not "reversible" (App. 22a-23a), pointing out that this Court had in *Holland* declined to upset the conviction on the basis of the error in the instruction.

As the present case shows, the language disapproved by this Court in *Holland* in the year 1954 is still being used after twenty years, and it appears in standard texts.[13] It has repeatedly been the subject of appellate challenges, which have been turned back consistently on the ground that the error was "harmless" or "not reversible," or insufficiently raised. *E.g.*, *United States* v. *Emalfarb*, 484 F.2d 787 (7th Cir. 1973) *cert. denied*, No. 73-398, Dec. 3, 1973, 42 U.S. Law Week 3333; *Scurry* v. *United States*, 347 F.2d 468 (D.C. Cir. 1965),

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[13] See 1 Devitt & Blackmar, Federal Jury Practice and Instructions (1970), § 11.01, p. 205 which contains a model instruction including both the proper language and the language rejected in *Holland*, and erroneously equating the two:

> "A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs."

The district court in the present case gave only the *improper* part of this instruction and did not charge the jury with the appropriate "hesitate to act" language.

cert. denied, 389 U.S. 883; *United States* v. *Restaino*, 369 F.2d 544, 546 (3d Cir. 1966); *United States* v. *Nuccio*, 373 F.2d 168, 174 (2d Cir. 1967), *cert. denied*, 387 U.S. 906; *James* v. *United States*, 416 F.2d 467, 475-76 (5th Cir. 1969), *cert. denied*, 397 U.S. 907; *United States* v. *Dunmore*, 446 F.2d 1214, 1221-28 (8th Cir. 1971), *cert. denied*, 404 U.S. 1041 (1972); *United States* v. *Cole*, 453 F.2d 902, 906 (8th Cir. 1972), *cert. denied*, 406 U.S. 922; *United States* v. *Bilotti*, 380 F.2d 649, 654 (2d Cir. 1967), *cert. denied*, 389 U.S. 944; *Jones* v. *United States*, 338 F.2d 553 (D.C. Cir. 1964); *United States* v. *Releford*, 352 F.2d 36, 40-41 (6th Cir. 1965), *cert. denied*, 382 U.S. 984; cf. *United States* v. *Hart*, 407 F.2d 1087, 1091 (2d Cir. 1969), *cert. denied*, 395 U.S. 916; *United States* v. *Heap*, 345 F.2d 170 (2d Cir. 1965).

The repeated excusing of an error as "harmless" twenty years after a definitive statement by this Court cannot be justified. As experience now demonstrates, the erroneous language evidently is in the pipeline of commonly used instructions; and it has persisted and will persist unless its use becomes a basis for reversal. This error also cannot be characterized as "harmless," particularly if the instruction is used repeatedly. Rather, the erroneous instruction is one "flirting unnecessarily with an impermissible lessening of the government's burden of proof," cf. *United States* v. *MacDonald*, 455 F.2d 1259, 1263 (1st Cir. 1972).

As explained in *Scurry* v. *United States*, *supra*, 347 F.2d at 470 (D.C. Cir. 1965):

> "Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act * * * in the more weighty and important matters in your own affairs.' A prudent person called upon to act

in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."

In view of the fact that reasonable doubt instructions are given in every criminal case, this is a matter of considerable and continuing importance to proper judicial administration, which warrants review and correction by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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